



## Kentucky Law Journal

Volume 58 | Issue 2

Article 5

1969

# "A Wanton Gospeller" Cries Out for Repeal of the Sunday Closing Law

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### Recommended Citation

Bland, John William Jr. (1969) "'A Wanton Gospeller' Cries Out for Repeal of the Sunday Closing Law," *Kentucky Law Journal*: Vol. 58 : Iss. 2 , Article 5.  
Available at: <https://uknowledge.uky.edu/klj/vol58/iss2/5>

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# Notes

## "A WANTON GOSPELLER" CRIES OUT FOR REPEAL OF THE SUNDAY CLOSING LAW

Kentucky's Sunday closing law<sup>1</sup> led a peaceful life for the first hundred and fifty years of its existence. Then, with the advent of the fifties and the sixties, the once peaceful existence came to an abrupt end. These two decades have witnessed a tremendous amount of confusion, discontent and litigation. Kentucky is not alone in this conflict, as witnessed by similar confusion and litigation that has taken place in almost every state and on the national level. This note, therefore, will endeavor to look at this conflict, its history, its attacks, the attacks that have evolved and finally a remedy to this conflict. At the outset, it is pointed out that this note will look at the general nature of the conflict present in all the states, but the major emphasis will be on the conflict that has arisen in Kentucky.

The passage of time as expressed in the history of man can lead to greater depths of reasoning and understanding. The wisdom gained by such an excursion through history can be used to correct

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<sup>1</sup> KY. REV. STAT. [hereinafter referred to as KRS] § 436.160 (1962). The text reads as follows:

(1) Any person who works on Sunday at his own or at any other occupation or employs any other person, in labor or other business, whether for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system, shall be fined not less than two dollars nor more than fifty dollars. The employment of every person employed in violation of this subsection shall be deemed as a separate offense.

(2) Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the Penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one day in each seven.

(3) Subsection (1) of this section shall not apply to amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera.

(4) Any person who holds any boxing or wrestling match or exhibition on Sunday shall be fined not less than ten dollars nor more than one hundred dollars.

(5) Any person licensed to keep, or any person controlling a billiard, pigeonhole or pool table who permits any game to be played on it on Sunday shall be fined not less than twenty-five dollars nor more than sixty dollars, and forfeit his billard pigeon-hole or pool table license if he holds such a license.

(6) Any person who hunts game, with a gun or dogs, on Sunday shall be fined not less than five dollars nor more than fifty dollars.

the mistakes of the past and present. To fully understand the Sunday closing laws, it is essential that their origin be studied with some depth. The attacks made on these laws and the hardships that have accompanied them in the past shed the necessary light and wisdom that will permit one to understand both the present status and the ultimate fate of the Sunday closing law.

The origin of the Sunday closing law is to be found in the Bible. The ancient Hebrews worshipped on the seventh day for two reasons, the first:

And on the seventh day God finished his work which he had done, and he rested on the seventh day from all his work which he had done. So God blessed the seventh day and hallowed it, because on it God rested from all his work which he had done in creation.<sup>2</sup>

And the second:

Remember the Sabbath Day, to keep it holy. Six days you shall labor and do all your work, but the seventh day is a sabbath to the Lord your God; in it you shall not do any work, you, or your son, or your daughter, your manservant, or your maidservant, or your cattle, or the sojourner who is within your gates. For in six days the Lord made heaven and earth, the sea and all that is in them, and rested the seventh day. Therefore, the Lord blessed the Sabbath day and hallowed it.<sup>3</sup>

The first direct evidence of the religious character of Sunday laws is to be found in the laws of Constantine in 321 A.D.<sup>4</sup> This law required all courts of justice, all inhabitants of towns, and all workers to be at rest on the "venerable day of the sun."

The first American statutes pertaining to the observation of Sunday were those of the Virginia ecclesiastics of the Church of England. Compulsory church attendance was the aim of these first laws. On October 5, 1692, the Virginia General Assembly ordered<sup>5</sup> that the military commanders should see to it that all the people went to church. They were also ordered to see that no work was done and that no journeys were made. Violators were to be fined under the General Assembly Act of 1623.<sup>6</sup>

This military enforcement of Sunday observance was disappoint-

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<sup>2</sup> *Genesis* 2:2-3.

<sup>3</sup> *Exodus* 20:8-11.

<sup>4</sup> Johnson, *Sunday Legislation*, 23 Ky. L.J. 131, 133 (1934-35).

<sup>5</sup> 1 Henning's Statutes at Large 144 (1823).

<sup>6</sup> 1 Henning's Statutes at Large 123 (1823). That whosoever shall absent himselfe from divine service any Sunday without an allowable excuse shall forfeite a pound of tobacco, and he that absenteth himselfe a month shall forfeite 50 lb. of tobacco. *Id.*

ing to its authors in that it proved to have the reverse effect of what was expected.<sup>7</sup> The good citizens developed all sorts of excuses for staying away from church, the most frequent being sickness, but the General Assembly saw through these contrived excuses. In 1632, with a jaundiced eye, the Virginia General Assembly passed another compulsory church attendance law to stop these Sabbath profaners.<sup>8</sup>

Meanwhile, in New England, the Puritans were creating Sunday laws of their own. The following is a brief summary of their early beginning:

By orders of the New England Company in 1629, all inhabitants were to surcease labor at [three o'clock on Saturday afternoon]. It was expected that all Puritans would be zealous in their church attendance. Yet, this was not the case as voids begin to appear in the congregation. On March 4, 1634, the General Court of Massachusetts Colony passed a law whereby non-attendance at church services was made a misdemeanor punishable by fine or imprisonment. The law worked well for a while, but due to the terrific ordeal of listening to extremely lengthy sermons, people either went to church infrequently or stayed away entirely. This caused the General Court to pass a more stringent law on November 4, 1646. A person who broke this law had to either pay a harsh fine or stand two hours openly upon a block four feet high, on a lecture day, with a paper fixed on his breast with "A WANTON GOSPELLER" written in capital letters, that others may fear and be ashamed of breaking into the like wickedness.<sup>9</sup>

On May 3, 1675, an even harsher law was passed, whereby the doors of the churches were to be locked once the services began to keep the people from secretly leaving while the services were in progress—a popular practice at the time.<sup>10</sup> This law also had the opposite effect of what was intended. The people resented the idea of being imprisoned in churches, and more pretexts were developed by an increasing number of people to stay away from church. The

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<sup>7</sup> G. MEYERS, *YE OLDEN BLUE LAWS* 88 (1921).

<sup>8</sup> 1 Henning's Statutes at Large 180 (1823). AND it is thought fitt, that the statutes for coming to church every Sunday and holidays be duly executed that is to say that the church-wardens doe levy one shilling for every tyme of any persons' absence from the church havinge no lawfull or reasonable excuse to bee absent. And for due execution here of the governor and counsell together with the Burgisses of the Grand Assembly doe in God's name earnestlie require and charge all commanders, captaines and church-wardnes that they shall endeavor themselves to the uttermost of theire knowledge that the due and true execution hereof may be done and had through this colony as they will answer before God for such evils and paynes wherewith Almighty God may justlie punish his people for neglectinge this good and wholesome lawe. *Id.*

<sup>9</sup> G. MEYERS, *supra* note 7, at 90-93.

<sup>10</sup> *Id.* at 96.

most outrageous of the Puritan laws created the establishment of spying committees.<sup>11</sup> Under this law, one man out of every ten families was appointed to spy on his fellowmen and arrest any Sabbath violator of any kind, haul him before a magistrate, and have him locked up.

Digressing from the past to the present for a brief moment, it is worth noting that the "most outrageous of the Puritan laws" is still with us today in a modified form, yet one having the same effect. In 1963, in Louisville, an anonymous group of retailers began a drive to force Sunday competitors to close. The group hired two private detectives to spy on the competitors and if the competitors opened for business, they were to swear out warrants for the competitor's arrest—which they did.<sup>12</sup> On October 9, 1969, three firms in Paducah filed a damage suit against four downtown establishments charging them with conspiracy to obtain evidence that could be used against them for remaining open on Sunday. The complaint specifically charged that the defendants "self-appointed themselves as officers of the law, or detectives, and as individuals or employees went to the various plaintiffs' places . . . for the sole purpose of securing evidence by purchasing articles from each."<sup>13</sup>

Returning to the past from this brief interlude with the reality of the present, it is to be found that the Pilgrims of Plymouth Colony imitated the harsh laws of the Puritans.

In 1662, the General Court of Plymouth Colony, in noting that too many church members were visiting ordinaries [taverns] instead of attending church, forbade keepers of ordinaries to draw any wine or liquor on the Lord's Day except for the faint and sick. After passage of this law, there was an alarming increase of persons who, on Sunday, would be taken with some kind of ailment necessitating liquid treatment. Soon, all pretexts were discarded and the ordinaries resumed an undisguised booming business on the Lord's Day.<sup>14</sup>

These laws were continued after the uniting of the Massachusetts and Plymouth colonies. Whenever disregard of the Sunday laws

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<sup>11</sup> *Id.* at 98.

<sup>12</sup> The Louisville Times, Aug. 13, 1962. [Note: Any newspaper article hereinafter cited which has no page or column number was obtained from either of two newspaper clippings files. Such articles in *The Courier-Journal*, *The Louisville Times*, and in *The State Journal*, can be found in the newspaper clipping file located in the Kentucky Room of the Louisville Free Public Library, 301 York Street, Louisville, Kentucky. Such articles in the *Lexington Herald* or *The Lexington Leader* can be found in the newspaper clipping file located in *The Lexington Herald Leader* library, 239 West Short, Lexington, Kentucky.]

<sup>13</sup> The Lexington Herald, Oct. 9, 1969, at 17, col. 6.

<sup>14</sup> G. MYERS, *supra* note 7, at 706.

became too conspicuous, new and more stringent laws would be passed. That there might be an over-dose of religious exaction, *i.e.* a surplusage of laws, was a concept that never occurred to the legislators.<sup>15</sup>

At the time of the outbreak of the Revolutionary War, the Law of Charles II was the basis of the Sunday law enforced in all the American colonies. Since it is the most important historical precedent<sup>16</sup> to our present law, its text is worthy of notation. That text, in part, is as follows:

For the better observation and keeping holy the Lord's day, commonly called Sunday, bee it enacted . . . that all the lawes enacted and in force concerning the observation of the Lord's day and repairing to the Church thereon be carefully putt in execution. And that all and every person and persons whatsoever shall on every Lord's day apply themselves to the observation of the same by exercising thereon in the duties of piety and true religion publicquely and privately and that noe tradesman, artificer workman, labourer or other person whatsoever shall do any exercise or worldly labour, business or worke of their ordinary callings upon the Lord's day or any part thereof (workers of necessity and charity onely excepted) and that every person being of the age of fourteene yeares or upwards offending in the premises shall for every such offense forfeit the summe of five shillings, and that noe person or persons whatsoever shall publickly cry shew forth, or expose to sale any wares, merchandizes, fruit, herb goods or chattells whatsoever upon the Lord's day. . . .<sup>17</sup>

Returning to the evolution of the Sunday laws of Virginia, beginning with the period after the compulsory church attendance law of 1632,<sup>18</sup> the next Sunday law was passed in 1642<sup>19</sup> and provided for ways in which to observe the Sabbath day such as by making no voyages and by shooting no guns. In 1657, an act was passed that said no journeys were to be made, no guns were to be fired, no goods were to be loaded on boats, and that everyone was to attend church.<sup>20</sup> In 1661,

<sup>15</sup> *Id.* at 118-19.

<sup>16</sup> Johnson, *supra* note 4, at 135.

<sup>17</sup> An Act for the Better Observation of the Lord's Day, Commonly Called Sunday, 29 Car. 2, c. 7, § 1 (1676); 3 Statutes at Large 388 (1770).

<sup>18</sup> 1 Henning's Statutes at Large 180 (1823).

<sup>19</sup> 1 Henning's Statutes at Large 261 (1823).

<sup>20</sup> 1 Henning's Statutes at Large 434 (1823).

THAT the Lord's day be kept holy, and that no journeys be made except in case of emergent necessitie on that day, that no goods bee laden in boates nor shooteings in gunns or the like tending to the prophanation of that day, which duty is to be taken care of by the ministers and officers of the severall churches, & by the commissioners in their places, and the partie delinquent to pay one hundred pounds of tobacco or layd in the stocks, and to take care that servants and other do repaire to their severall churches everie Lord's day.

another law<sup>21</sup> was passed that required the Lord's day to be kept holy, that no work was to be done, except in cases of necessity; that devine services and preaching diligently attended; and that the Quakers were especially subject to the penalties for breaching. Later, in 1691, another law<sup>22</sup> was passed that forbade travel, assembly or anything that would tend to keep the people from attending church. A similar law was passed in 1696,<sup>23</sup> except that the penalties were increased. This law was repeated again in 1705.<sup>24</sup> This, in essence, was the development of the Sunday law in Virginia and this was the law the pioneers brought to Kentucky.

The Sunday law was first adopted in Ketnucky in 1801 and has for the most part, remained unchanged to the present day. This law, in part, reads as follows:

If any person on the sabbath shall himself be found laboring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves, in labor or other business, whether the same be for profit or amusement, unless expressly permitted by this act, (and no work or business shall be done or performed on the sabbath day, unless the ordinary household offices of daily necessity, or other work of necessity or charity,) he shall forfeit the sum of ten shillings for every offence, deeming every apprentice, servant or slave so employed, and every day he shall be so employed, as constituting a distinct offence: *Provided, however,* that no person who is a member of any religious society, who observes as a sabbath any other day of the week than Sunday, or the Christian Sabbath, shall be liable to the penalty hereby incurred for a breach of the sabbath; so that they observe one day in seven, agreeable to the regulations aforesaid.<sup>25</sup>

Several conclusions are clear from this summary of the historical background of the Sunday closing law as it evolved up until 1801 when Kentucky passed such a law. First, Sunday laws have always been the product of church-state unions;<sup>26</sup> second, they have always been religious laws;<sup>27</sup> third, they were never able to accomplish their intended result; fourth, the people deeply resented these laws; and fifth, the legislators lacked the wisdom to ever question the efficacy of these laws.

Is there not a moral to be learned from two hundred years of history? Most certainly a truism, yet one that Puritan theocratic legislators

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<sup>21</sup> 2 Henning's Statutes at Large 48 (1823).

<sup>22</sup> 3 Henning's Statutes at Large 78 (1823).

<sup>23</sup> 3 Henning's Statutes at Large 138, 139 (1823).

<sup>24</sup> 3 Henning's Statutes at Large 360, 361 (1823).

<sup>25</sup> 2 Littell's Statute Law of Kentucky 480 (1810).

<sup>26</sup> L. PFEFFER, CHURCH, STATE AND FREEDOM 229 (1953).

<sup>27</sup> *Id.*

could never understand, was "that laws were one thing and life was another."<sup>28</sup> Theirs was a world in which the human being was to be made to fit the rigid formulas rather than a world where the law fit the needs of human beings.<sup>29</sup> The moral to be learned by the failings of early legislation may be expressed as follows:

The Puritan clerical mind was both naive and solidified. Its surprise was enormous that laws did not answer expectations, yet never did it think of either questioning the wisdom of laws or of analyzing their palpable effects. Laws, laws, laws were its perpetual demand.<sup>30</sup>

The Sunday laws have been attacked on numerous grounds. For the sake of brevity, only the three most common attacks will be discussed. The most frequent attack has been that the Sunday laws violate the first amendment.<sup>31</sup> This frequency is an interesting fact in that the religious guarantees of the first amendment have only recently become available. It was not until 1940 that the first amendment's religious provisions were specifically declared to be applicable to the states.<sup>32</sup> In *Crown Kosher Super Market of Massachusetts, Incorporated v. Gallagher*,<sup>33</sup> Federal District Judge Magruder held that the Lord's Day statute of Massachusetts, having its roots in attempted religious regulation and aiding the dominant Christian sects, violated the "establishment clause" of the first amendment. Judge Magruder's holding was short-lived, however, because it was soon reversed by the Supreme Court.<sup>34</sup> In the companion case *Braunfeld v. Brown*,<sup>35</sup> the Supreme Court went further in holding that Sunday laws do not infringe upon Sabbatarians<sup>36</sup> free exercise of religion. The Court's reasoning was that the Sunday laws do not exert direct pressure on the beliefs of Sabbatarians, but only economic pressure which alone is insufficient. In *McCowan v. Maryland*,<sup>37</sup> the Court said it is within the state police power to provide a day of uniform rest, and that this purpose is secular and not religious even if the chosen day is Sunday.

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<sup>28</sup> G. MYERS, *supra* note 7, at 93.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 139.

<sup>31</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

<sup>32</sup> *Cantwell v. Connecticut*, 300 U.S. 296 (1940).

<sup>33</sup> 176 F. Supp. 466 (D. Mass. 1959), *rev'd*, 366 U.S. 617 (1961).

<sup>34</sup> *Gallagher v. Crown Kosher Supermarket of Mass.*, 366 U.S. 617 (1961).

<sup>35</sup> 366 U.S. 599 (1961).

<sup>36</sup> A Sabbatarian is one who keeps the seventh day of the week as holy in conformity with the letter of the fourth commandment. Webster's Seventh New Collegiate Dictionary 756 (1963 ed.).

<sup>37</sup> 366 U.S. 420 (1961).



*McCowan* and *Braunfeld* taken together hold that if the legislative purpose of enacting a Sunday closing law is not to advance a particular religious sect or to adversely effect Sabbatarians, the law is not violative of the first amendment, even when, in actuality, the law has both these effects in economic terms.<sup>38</sup> Kentucky adopted this line of reasoning in *Commonwealth v. Arlan's Department Store of Louisville*.<sup>39</sup>

Another frequent attack is that the discriminations and exceptions, apparent on the face of the Sunday laws, constitute a denial of equal protection of the laws under the fourteenth amendment.<sup>40</sup> The thrust of this argument in Kentucky has centered around the meaning of the phrase, "work of necessity."<sup>41</sup> As indefinite, imprecise and undefined as this phrase is on the face of the statute, the Court of Appeals has ruled that this phrase was not so vague as to be unenforceable.<sup>42</sup>

Another frequent argument has been that the arbitrary closing of certain businesses is not a valid exercise of the police power of a state.<sup>43</sup> In 1884, Justice Field made the now classic statement that Sunday laws were valid enactments under the state's police power. He said:

Laws setting aside Sunday as a day of rest are upheld not from any right of the government to legislate for the promotion of religious observance, but from the right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.<sup>44</sup>

The most common rationale in support of presently existing Sunday laws is that they promote community health and welfare. States have theorized that they are providing a "day of rest."<sup>45</sup> In fact, the Supreme Court recently said:

The present purpose and effect of most of [the Sunday laws] is to provide a uniform day of rest for all citizens; the fact that this is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular

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<sup>38</sup> Comment, *A New Look at Sunday Closing Legislation*, 45 NEB. L. REV. 775, 776 (1966).

<sup>39</sup> 357 S.W.2d 708 (Ky. 1962).

<sup>40</sup> *Crown Kosher Supermarket of Mass., Inc. v. Gallagher*, 176 F. Supp. 466, 475 (D. Mass. 1959). See also Note, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 12 RUTGERS L. REV. 505, 508 (1958).

<sup>41</sup> Cf. *Arlan's Dept Store of Louisville v. Commonwealth*, 369 S.W.2d 9 (Ky. 1963).

<sup>42</sup> *Id.*

<sup>43</sup> *Crown Kosher Supermarket of Mass., Inc. v. Gallagher*, 176 F. Supp. 466, 475 (D. Mass. 1959).

<sup>44</sup> *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1884).

<sup>45</sup> Comment, 35 NOTRE DAME LAW 569, 570 (1960).

goals. To say that the states cannot prescribe Sunday as a day of rest for those purposes [public health, welfare and recreation] solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.<sup>46</sup>

Therefore, it would appear that the legality of Sunday closing laws will depend upon whether the particular statute can be categorized as imposing a day of rest upon the state's citizens rather than promoting the practices of a religious group. If the statute can be categorized as providing a day of rest, the statute will be a constitutionally valid exercise of the state's police power.<sup>47</sup> As the results of these common attacks upon the Sunday laws show, the courts are prone to uphold them.

Conceding the fact that Sunday laws have been with us for nearly two thousand years, and conceding the fact that the Supreme Court has, in the past, upheld the validity of these laws, this does not make these laws an impenetrable bulwark of righteousness. That these laws are not as righteous as they would appear is evident by the multitudinous litigation that has transpired in the past two years. This myriad of litigation and confusion has produced an array of grounds with which to attack once more Kentucky's seemingly eternal Sunday closing law.

First, the Sunday statutes are religious laws and are contrary to the first amendment, the Supreme Court's decisions<sup>48</sup> notwithstanding. The text of the laws themselves is *prima facie* evidence that the object and purpose of Sunday laws is the enforcement of religion.<sup>49</sup> The Supreme Court of Massachusetts said:

Our Puritan ancestors intended that the day [referring to Sunday] should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time.<sup>50</sup>

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<sup>46</sup> *McCowan v. Maryland*, 366 U.S. 420, 445 (1961).

<sup>47</sup> Note, *The Constitutional Status of Indiana Sunday Closing Law*, 37 IND. L.J. 397 (1962).

<sup>48</sup> *Gallager v. Crown Kosher Supermarket of Mass.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two-Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *McCowan v. Maryland*, 366 U.S. 420 (1961).

<sup>49</sup> *Johnson*, *supra* note 4, at 137.

<sup>50</sup> *Davis v. Somerville*, 128 Mass. 594, 596 (1880).

The high court of Alabama, in *O'Donnal v. Sweeny*, said:

We do not think the design of the legislature in the passage of the act can be doubted. It was evidently to promote morality and advance the interests of religion, by prohibiting all persons from engaging in their common and ordinary avocations of business, or employment, on Sunday. . . .<sup>51</sup>

In *Karwich v. Mayor and Council of Atlanta*,<sup>52</sup> a case in which the plaintiff was convicted for keeping his store open on Sunday, the Supreme Court of Georgia said: "The law fixes the day recognized as the Sabbath day all over Christendom, and that day, by Divine injunction, is to be kept holy—'on it thou shalt do no work.'"<sup>53</sup>

The Kentucky courts in attempting to evade the religious effect and design of Sunday laws, have nevertheless embodied in their opinions statements showing that the intent and purpose of the law was to advance the interests of religion and guard the sancity of the Lord's day as a time-honored and heaven-appointed institution.<sup>54</sup> For example, in a case involving the applicability of two statutes, the Court said that one applied "exclusively to Sundays as sacred, and the other to holidays as secular."<sup>55</sup> In another case involving a Sunday statute, the Court said: "And this intent [of the state] was to compel observation of the Sabbath day by all persons without reference to trade, business or occupation. . . ."<sup>56</sup>

Two specific rights are guaranteed under the first amendment's "establishment clause."<sup>57</sup> First, each person has the right that no religion be preferred by the government over others, *i.e.* that there be no laws respecting the establishment of a religion. Secondly, each person has the right to the free exercise of religion and this includes the right not to have or believe in any religion.<sup>58</sup>

In *Everson v. Board of Education*,<sup>59</sup> the Supreme Court explained what the first amendment's establishment clause means:

The 'establishment of religion' clause . . . means at least this:  
Neither a state nor the federal government can set up a church.

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<sup>51</sup> 5 Ala. 467, 469 (1843).

<sup>52</sup> 44 Ga. 205 (1871).

<sup>53</sup> *Id.* at 208.

<sup>54</sup> Johnson, *supra* note 4, at 140.

<sup>55</sup> Moore v. Hagan, 63 Ky. (2 Duv.) 437, 439 (1866).

<sup>56</sup> Johnson, *supra* note 4, at 153, citing Gray v. Commonwealth, 171 Ky. 269, 188 S.W. 354 (1916).

<sup>57</sup> U.S. CONST. amend I: "Congress shall make no law respecting an establishment of religion. . . ."

<sup>58</sup> See generally Comment, *Freedom of Religion and the Recent Sunday Closing Laws Cases*, 3 WM. & MARY L. REV. 384, 385 (1962).

<sup>59</sup> 330 U.S. 1 (1946).

Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.<sup>60</sup>

Yet, after this seemingly explicit definition, the Supreme Court later denied that Sunday laws run afoul of the *Everson* principle by saying that Sunday laws only "indirectly" aid religion.<sup>61</sup> The only rationale must be that remnants of the Puritan clerical mind still exist, at least in our courts.

The wisdom of Justice Douglas in his dissent in *McCowan v. Maryland*<sup>62</sup> is the more honest and realistic interpretation of such laws.

No matter how much is written, no matter what is said, the parentage of these laws in the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities.<sup>63</sup>

The wisdom and perception of Justice Douglas can be demonstrated by activities that have taken place in Kentucky. In 1960, a Catholic-Protestant merchant coalition was formed to oppose Sunday business.<sup>64</sup> (This in itself tends to show that the intent of the Sunday law is to aid religion.) This religious coalition had laudable aims at first in that the first phase of their campaign was aimed at the churchgoers themselves. "If we're going to ask merchants not to do any Sunday selling, first we have to ask people not to do any Sunday shopping."<sup>65</sup> But these laudable aims were short-lived. This group said that if their public no-buying campaign failed, they would ask for legal enforcement of the Sunday closing law.<sup>66</sup> Does this not sound familiar? It should. This activity is exactly what was going on in the colonies of Massachusetts and Plymouth in the seventeenth century. Again in 1962, the Louisville Council of Churches executive board called for a boycott of Sunday shopping by church members.<sup>67</sup> Apparently the churches were becoming aware that their congregation had paid little heed to their earlier campaign. At that particular time, a case<sup>68</sup> was pending in the Court of Appeals. The board called for "vigorous enforcement" of Sunday closings if the Court ruled that Sabbath business should halt,<sup>69</sup> which the Court subsequently did. The Court's

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<sup>60</sup> *Id.* at 15.

<sup>61</sup> *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

<sup>62</sup> 366 U.S. 420 (1961).

<sup>63</sup> *Id.* at 572, 573.

<sup>64</sup> The Louisville Times, Jan. 20, 1960.

<sup>65</sup> The Courier-Journal, Jan. 21, 1960.

<sup>66</sup> *Id.*

<sup>67</sup> The Louisville Times, Jan. 19, 1962.

<sup>68</sup> *Commonwealth v. Arlan's Dep't Store of Louisville*, 357 S.W.2d 708 (Ky. 1962).

<sup>69</sup> The Louisville Times, Jan. 19, 1962.

decision to uphold the Sunday closing law is, therefore, at least being used as an aid to foster religion.

In addition, Justice Douglas, in the *McCowan*<sup>70</sup> dissent, said:

What better way to 'establish' an institution than to find the fund that will support it? The 'establishment clause' protects citizens . . . against any law which selects any religious custom, practice or ritual, which puts the force of government behind it and fines, imprisons, or otherwise penalizes a person for not observing it.<sup>71</sup>

To require abstention from non-religious activity on Sunday is, at least to some degree, to influence church attendance.<sup>72</sup> "It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion."<sup>73</sup> If this was not true, the religious groups in Kentucky would not be so emphatic to have these laws strictly enforced. As Justice Douglas said:

. . . [I]t is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority in doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs.<sup>74</sup>

Second, the Sunday laws are a violation of the "due process" clause of the fourteenth amendment.

The right of citizens to pursue an ordinary calling is a part of their right of liberty and property, and any law which prevents or abridges the privilege is obnoxious to the Constitution of this State and the United States.<sup>75</sup>

This basic precept was foremost in the minds of the Louisville Jaycees in 1960 when they called for a repeal of the Sunday closing law. It was the opinion of the Jaycees that the law's restrictions were:

. . . an unwarranted and undesirable infringement upon the rights of citizens [which] negate the basic precept that a man should be granted and guaranteed the right to use his property as he sees fit so long as the rights of others are not thereby infringed.<sup>76</sup>

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<sup>70</sup> 366 U.S. 420, (1961).

<sup>71</sup> *Id.* at 564.

<sup>72</sup> 37 IND. L.J. *supra* note 47, at 405.

<sup>73</sup> Johnson, *supra* note 4, at 140.

<sup>74</sup> *McCowan v. Maryland*, 366 U.S. 420, 575 (1961).

<sup>75</sup> Johnson, *supra* note 4, at 154-55, citing *People v. Steele*, 231 Ill. 340, 83 N.E. 236 (1907).

<sup>76</sup> *The State Journal*, Dec. 12, 1963; *The Louisville Times*, Feb. 29, 1964.

A Louisville city alderman recently said, "It [the Sunday closing law] takes away a person's rights as a citizen."<sup>77</sup> In Paducah, three firms fined for opening on Sunday filed a suit against four downtown merchants who were responsible for having the law invoked against them charging the downtown merchants with "restraint or trade."<sup>78</sup> in summary, it may be said that:

. . . [O]ur government was not designed to be paternal in form.  
 . . . Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal right of his fellows. . . .

A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet this is precisely what this [Sunday] law does.<sup>79</sup>

Third, Sunday closing laws are not a valid exercise of the police power, notwithstanding the fact that the laws are currently upheld as a valid exercise of the state's police power to protect the laboring classes from excessive work.<sup>80</sup> Police power is the inherent power in the state which enables it to prohibit all things harmful to the comfort, safety and welfare of society. It may be used to aid that which is sanctioned by usage or held by the prevailing morality to be greatly and immediately necessary to the public welfare.<sup>81</sup> If this is the test, then could it not be said that allowing businesses to stay open adds to the comfort of society by providing people the opportunity to purchase things when they need them. Allowing stores to stay open is

<sup>77</sup> The Louisville Times, Sept. 19, 1969, at 24, col. 1.

<sup>78</sup> The Lexington Herald, Oct. 9, 1969, at 17, col. 6-7.

<sup>79</sup> Ex parte Jentzsch, 112 Cal 468, 44 P. 803 (1896).

A law prohibiting all Sunday business has no logical foundation. It is an axiom of American society that business should not be unnecessarily regulated. A Sunday law which deprives the populace of the convenience of accessible stores, and proprietors of the opportunity to seek again, is unnecessary when the purpose of the law is limited to the avoidance of disturbing religious worship.

See generally 35 NOTRE DAME LAW, *supra* note 45, at 572.

<sup>80</sup> Rodman v. Robinson, 134 N.C. 503, 508-09, 47 S.E. 19, 21 (1904). There the court said the only ground upon which "Sunday laws" could be sustained was that in pursuance of police power the state can require a cessation of labor upon specific days to protect the masses from being worn-out by incessant and unremitting toil. But in those days, the people were subject to long hours of labor. The forty-hour week was unheard of. Today, labor has more bargaining power. The police power of a state is no longer necessary to protect the laboring classes.

Whatever work the state may undertake for the moral benefit of her subjects, the person's conscience should be respected. The claim put forth upon certain occasions that the design of Sunday laws is to secure liberty and health for the laboring classes does not reach the core of the question. 35 NOTRE DAME LAW, *supra* note 45, at 572.

<sup>81</sup> Noble State Bank v. Haskell, 219 U.S. 104 (1911).

also an aid to both safety and welfare. Who knows when a person is going to need medicine, milk for babies, extra food, etc.?<sup>82</sup> "Probably the largest group [favoring the abolition of the law] are those of us for whom convenience has become something of a god—it is handy to have a store open to get the thing we forgot on Saturday."<sup>83</sup> The main vice of the Sunday closing law is that it is not being used to aid the comfort, safety or welfare of society.

Where the ostensible object of an enactment under the police power is to secure the comfort, welfare or safety, it must appear to be adapted to that end. It cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact. . . .<sup>84</sup>

If the state *really* wanted to aid in the comfort of its people, it could enact a "one-day-of-rest-in-seven" law, as some people are advocating.<sup>85</sup> The Supreme Court has not been receptive to this idea.

. . . [T]he State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.<sup>86</sup>

However, the Sunday closing laws are ill equipped to be used as a tool for the establishment of a day of rest for "all the members of the family," because of the ease with which the employees who most need a day of rest are often excluded from coverage by the statutes.<sup>87</sup> This is especially true in Kentucky. Kentucky, as a leader

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<sup>82</sup> A woman shopper became outraged when greeted by the crackdown on grocery stores. After spending much of the day attempting to buy a special formula for her baby, she said:

I've had it. I had to go to my pediatrician to give me a prescription. My baby could have died. I think this is terrible. It's ridiculous. The store . . . can't sell milk for a baby. The Courier-Journal, Sept. 1, 1969, § A, at 1, col. 1-3.

<sup>83</sup> The Courier-Journal, April 25, 1960.

<sup>84</sup> *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895).

<sup>85</sup> Johnson, *supra* note 4, at 131.

<sup>86</sup> *McCowan v. Maryland*, 366 U.S. 420, 450 (1961).

<sup>87</sup> Note, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 12 *RUTGERS L. REV.* 505, 513 (1958). See also *Ex parte Jentzsch*, 112 Cal. 468, 44 P. 803 (1896). There the court said:

There is no Sunday period of rest and no protection for overworked employees of our daily papers. Do those not need rest and protection? The bare suggestions of these considerations shows the injustice and inequality of this law. *Id.* at 804.

in tourism and vacation resorts, has a large number of her citizens working in state parks, resorts, motels, restaurants and service stations who labor their hardest on Sunday. With so many of the people working on Sunday, under the present exceptions to the law, how could "all the members of the family" spend the day together? For these people, there exists very little quiet and disassociation from the everyday intensity of commercial activity. Upholding the Sunday closing law on the theory that it is a valid exercise of the police power is merely a facade from the realities of the situation. And, as an afterthought:

If it once be admitted that the Legislature has power to thus provide for the public health and good morals, where is the limit to its exercise? And if the public can thus be provided for . . . there would be just as much propriety in enacting the number of hours out of twenty-four during which all should sleep, on the pretense of compelling a restoration of exhausted energies, as in prescribing the number of hours in every week during which all must refrain from their ordinary avocations.<sup>88</sup>

*Fourth*, the Sunday closing laws are violative of the void-for-vagueness rule. The void-for-vagueness rule was explicitly stated in *United States v. Capital Transaction Company*.<sup>89</sup> That rule is as follows:

In a criminal statute the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. The dividing line between what is lawful and unlawful cannot be left to conjecture. . . . The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.<sup>90</sup>

In *Sullivan vs. Brawner*,<sup>91</sup> it was suggested that a criminal enactment that is so indefinitely phrased as to require conjecture in determining its meaning not only violates fundamental rights of individuals charged with disobeying it, but also delegates legislative powers to the courts.

The major attack of the vagueness charge in Kentucky has centered around the meaning of the phrase, "work of necessity." Citing both the *Capital Transaction Company* case and the *Sullivan* case, the court has held<sup>92</sup> that this phrase, "work of necessity," was not so

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<sup>88</sup> *Ex parte Koser* (Petitioner's Brief), 60 Cal. 177 (1882).

<sup>89</sup> 34 App. D.C. 592, 19 Ann. Cas. 68 (1910).

<sup>90</sup> *Id.* at 598, 19 Ann. Cas. at 70.

<sup>91</sup> 237 Ky. 730, 36 S.W.2d 364 (1931).

<sup>92</sup> *Arlan's Dep't Store of Louisville v. Commonwealth*, 369 S.W.2d 9 (Ky. 1963).



vague as to be unenforceable. It is inconceivable how the Court could come to this conclusion. The law is so imprecise that Attorney General John Breckinridge gave up an attempt to write an omnibus interpretation of it.<sup>93</sup> Judges<sup>94</sup> throughout Kentucky have consistently said the statute was too vague to enforce. Mayors<sup>95</sup> and city officials<sup>96</sup> realize the vagueness of the law. Law enforcement officers<sup>97</sup> do not know how to enforce the law. Newspapers<sup>98</sup> have criticized the laws as being vague. But most compelling of all is the fact that the merchants<sup>99</sup> and citizens<sup>100</sup> cannot intelligently choose in advance what course of conduct is lawful. One would be hard-pressed to find more convincing evidence that the "work of necessity" phrase is truly vague. Other states have invalidated similar statutes. In Kansas<sup>101</sup> and Missouri,<sup>102</sup> statutes prohibiting the Sunday sale of merchandise except for drugs and medicine, provisions or other articles of immediate necessity were held to be too indefinite for enforcement.

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<sup>93</sup> The Louisville Times, Jan. 21, 1963.

<sup>94</sup> The Courier Journal, Sept. 17, 1969, at 10, col. 3. In 1963 Judge Colson of Louisville found the Sunday closing law to be unconstitutional on the grounds it was too vague to enforce. See also The Louisville Times, Sept. 17, 1965, quoting County Judge Herbert H. Tabb (Hardin County) as saying he had talked with other judges around the state and:

. . . [T]hey all say the hell with the law (Sunday closing law), because if you don't have the law cut and dried and don't know how to enforce it, what are you going to do?

The judge maintains that the law is so vague that an officer doesn't know whom to arrest. Concerning the vagueness of the law, Judge Tabb said, "There's not an attorney in town who can tell me how to enforce it, not even the Attorney General in Frankfort can."

Circuit Judge Fred Warren of Campbell County threw out 470 charges under the law, asserting that it was too vague to give citizens notice of what is prohibited. The Louisville Times, May 19, 1967.

<sup>95</sup> Louisville's mayor when confronted with whether or not to enforce the law against used-car sellers operating on Sunday, said: "It's hard to tell where to draw the line." The Louisville Times, Jan. 20, 1956.

<sup>96</sup> "There has been questions in the minds of officials here as to exactly where the Sunday business ban begins, and what is 'work of necessity.'" The Louisville Times, Aug. 13, 1962.

<sup>97</sup> "Law enforcement officials cannot be sure what the Sunday closing law means. That in itself is rather persuasive evidence that it is an absurd law." The Louisville Times, July 28, 1965. "In the present state of the Sunday law, it is unjust to ask any public officer to attempt to draw the line between what the law says and what people actually and openly do." See also The Louisville Times, Jan. 20, 1956.

<sup>98</sup> "It is the position of this newspaper that Kentucky's Sunday closing law ought to be repealed. It is so vague that fair enforcement is virtually impossible." The Louisville Times, Jan. 24, 1963.

<sup>99</sup> "A bewildered ice-cream-stand operator said he doesn't know 'whether I can stay open on Sunday or not. I called the police, the County Judge, and the City Law Department, and none of them can tell me.'" The Courier-Journal, Jan. 19, 1963.

<sup>100</sup> "City police said one man called them to inquire if he could legally cut his grass on Sunday." The Courier-Journal, Sept. 8, 1969, § A, at 6, col. 5-6.

<sup>101</sup> State v. Hill, 189 Kan. 403, 369 P.2d 365 (1962).

<sup>102</sup> Harvey v. Priest, 366 S.W.2d 324 (Mo. 1963).

*Fifth*, the Sunday closing laws are invalid because they are enforced with unequal application. In *Yick Wo v. Hopkins*,<sup>103</sup> the Supreme Court held:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>104</sup>

When the Kentucky Court was first confronted with the *Yick Wo* principle, as it applied to the Sunday closing law, the Court said the principle was not applicable because the statute authorizes no discretion in its administration or application. ". . . [T]he failure of executive officers to enforce a specific law against a specific individual or set of individuals can never excuse the disobedience of that law by another."<sup>105</sup>

Later, in *City of Covington v. Gausepohl*,<sup>106</sup> the Court said that instead of enjoining all enforcement of the ordinance involved, the trial court should only have enjoined the city from making discriminations in its enforcement. Finally, in response to the question of whether or not the Sunday closing law could be enforced against a discount house while other establishments (such as pharmacies or drugstores, groceries or supermarkets, and car washes), some of which sell many of the same types of merchandise as the discount house, are permitted to do business as usual on Sunday, the Court said that this would be "an obvious and flagrant violation of the equal protection clause of the fourteenth amendment."<sup>107</sup> One would think that after such a pronouncement as this, such unequal enforcement would cease. Yet such has not been the case.<sup>108</sup> If the law is to

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<sup>103</sup> 118 U.S. 356 (1886).

<sup>104</sup> *Id.* at 373-74.

<sup>105</sup> *Strand Amusement Co. v. Commonwealth*, 241 Ky. 48, 50, 43 S.W.2d 321, 323 (1931).

<sup>106</sup> 250 Ky. 323, 62 S.W.2d 1040 (1933).

<sup>107</sup> *City of Ashland v. Heck's, Inc.*, 407 S.W.2d 421 (Ky. 1966).

<sup>108</sup> The following are examples of such unequal enforcement:

The Louisville and Jefferson County police departments are a typical example of how Kentucky's Sunday closing law is being unequally applied. The Louisville Police Department issued 103 citations on Sunday to city merchants, while on the same Sunday, the Jefferson County Police Department issued no citations at all to the county merchants who remained open. *The Courier-Journal*, Sept. 2, 1969 § A, at 14, col. 1.

The manager of a discount store charged in a letter to the county judge, the city manager and the county attorney, that persons were observed working in twenty businesses last Sunday while his store was forced to close in observance of the Sunday closing law. Firms in which persons were seen working included a pawn shop, garage, jewelry

(Continued on next page)

be enforced at all it must be enforced as a whole and not in part.<sup>109</sup>

*Sixth*, the Sunday laws are invalid because they constitute class legislation. The statutes frequently contain classifications which, while not violative of the equal protection clause of the fourteenth amendment, are in an economic sense extremely arbitrary, even to the point of being oppressive.<sup>110</sup> This is extremely relevant to the present status of the law in Kentucky. Louisville Police Court Judge William Colson recently rendered an admirable and enlightened decision in which he clearly set forth this argument. Judge Colson said:

While it is true that the legislature may classify certain acts, such classifications must be based on reasonable and natural distinction. Is it a reasonable and natural distinction to say that a restaurant may sell food on Sunday, but a grocer cannot sell groceries? Is it a reasonable and natural distinction to say that a tavern can sell beer on Sunday, but that a dairy cannot sell milk? . . . We think not. . . . To hold one person guilty of a crime for doing an act and another is granted immunity from prosecution for the same act violates our basic concept of justice.<sup>111</sup>

After this decision, the Louisville Board of Aldermen passed a city ordinance to broaden the scope of what constitutes work of necessity.<sup>112</sup> A similar ordinance was passed earlier in Bowling Green,<sup>113</sup> litigation over which is presently pending before the Court of Appeals.<sup>114</sup> Both the Louisville ordinance and the Bowling Green ordinance are patterned after an earlier one passed by the City of Paducah which contains a list of express items which cannot be sold on Sun-

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(Footnote continued from preceding page)

store, apparel stores, a beauty shop, an insurance company, an optical company, a florist, banks, bookstores, real estate firms, a sewing machine store, a barber shop and an auto parts store. The Lexington Herald, Oct. 31, 1963.

<sup>109</sup> "The Sunday law has been enforced here in a discriminatory manner and should be enforced on an all-or-none basis." The Courier-Journal, Jan. 19, 1963. See also Courier-Journal, Feb. 20, 1963.

<sup>110</sup> Note, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 12 RUTGERS L. REV. 505, 508 (1958).

<sup>111</sup> The Courier-Journal, Sept. 17, 1969, § A, at 10, col. 3. See also Courier Journal, Sept. 16, 1969, § A, at 1, col. 1-2; The Courier-Journal, Sept. 8, 1969, § A, at 1, col. 4.

<sup>112</sup> The Courier-Journal, Oct. 2, 1969, § A, at 6, col. 3-5. See also The Lexington Leader, Oct. 1, 1969, at 2, col. 2-3; The Louisville Times, Sept. 19, 1969, § A, at 1, col. 1-5.

<sup>113</sup> The Courier-Journal, Oct. 2, 1969, § A, at 6, col. 4-5. The Bowling Green ordinance lists certain items which may be sold on Sunday, such as drugs, groceries, and sundries.

<sup>114</sup> The Court of Appeals has tentatively agreed to hear the litigation on February 16, 1970. The style of the case is Thomas A. Boyle v. Charles Campbell, Court of Appeals docket number S-187-69.

day.<sup>115</sup> While these ordinances are a step in the right direction, in that they show an intent on the part of the cities to cope with the realities of the situation, it must be noted that another state court (Nebraska) has found similar enactments to be arbitrary and unreasonable.

In *Terry Carpenter, Incorporated v. Wood*,<sup>116</sup> the plaintiff seller sold a can of paint, a toy, two cans of vegetables, one pair of ladies hose and a can opener in violation of the Nebraska Sunday closing law.<sup>117</sup> The court found that the state objective of promoting health, peace, and good order of society is not secured by allowing some retailers to remain open and requiring others to close. The court found the law to be "discriminating, arbitrary and unreasonable" when it allowed hamburger buns to be sold, but not hamburgers, and when it allowed commercial recreational activities on Sunday, but prohibited the sale of other commodities.<sup>118</sup> In a concurring opinion, one justice made this perceptive point:

The impracticality of classifying by the business or commodity approach is almost insurmountable. . . . [The court] strikes down the act on the basis of discriminating classifications, when proper classifications appear to border on the impossible.<sup>119</sup>

In *Skag-Way Department Store, Incorporated v. City of Omaha*,<sup>120</sup> two Omaha city ordinances<sup>121</sup> were challenged by the plaintiff. They required only two classes of businesses to close on Sunday: 1) those that had as their main purpose the selling of clothing, shoes, jewelry, ready to wear items and hardware and 2) those that sold groceries, fruits and vegetables and meat. All other businesses were exempted. The court held that the ordinances were not related to the "health, safety, peace and good order of society and, even if they did so relate

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<sup>115</sup> The Paducah ordinance prohibits Sunday sales of wearing apparel, housewares, textiles, home and business or office furniture, fixtures or appliances, hardware, tools, building materials, jewelry, silverware, watches and clocks, luggage, musical instruments and recordings, and toys except novelties and souvenirs. The State Journal, Dec. 15, 1963.

<sup>116</sup> 177 Neb. 515, 129 N.W.2d 475 (1964).

<sup>117</sup> NEB. LAWS ch. 392, § 3 (1963).

<sup>118</sup> 177 Neb. 515, 526, 129 N.W.2d 475, 480 (1964).

<sup>119</sup> *Id.* at 529-30, 129 N.W.2d at 483 (concurring opinion). See also *Pacesetter Homes, Inc. v. Village of South Holland*, 18 Ill.2d 247, 163 N.E.2d 464 (1960). In this case, an ordinance directed against all Sunday business activity, except that necessary to satisfy emergency needs was held to be invalid since it made no attempt to classify activities according to their relationship to the legitimate exercise of police power. The court also said that general legislation cannot be valid as to one kind of activity within its terms and invalid as applied to another kind equally within its terms.

<sup>120</sup> 179 Neb. 707, 140 N.W.2d 28 (1966).

<sup>121</sup> Omaha, Neb., Municipal Code §§ 19.24.010 and 19.24.010 (1959).

themselves, they are discriminatory as to those in the same class."<sup>122</sup>

As these two cases show, no matter whether the purpose of Sunday legislation is to require complete work-stoppage or to provide a day of rest and tranquility, the classifications covered by the statute bear no reasonable relationship to either purpose.<sup>123</sup> Moreover, the classification of stores in accordance with commodities sold no longer provides a proper method of arrangement because the drug store, the discount house and the supermarket generally sell all the goods formerly sold only in the community stores.<sup>124</sup>

*Seventh*, the Sunday closing laws are antiquated. Judges admit the philosophy is antique.<sup>125</sup> This time-worn philosophy is responsible for much of the hostility toward the statutes.<sup>126</sup>

*Eighth*, the Sunday laws are subject to sporadic enforcement. Laws that are not consistently enforced create an aura of disrespect in the eyes of the public.<sup>127</sup> Neither is sporadic enforcement compatible with the characterization of the law as a vehicle with which the state seeks to promote the public health and welfare.<sup>128</sup> It also is inconsistent with one of the fundamental principles of ordered liberty, namely that of the assurance of responsible control over the scope and probable regularity of exercise of governmental force.<sup>129</sup>

*Ninth*, the Sunday closing law is both discriminatory and just plain unfair. The discrimination is clear and undeniable.<sup>130</sup> Why should a drug store be allowed to stay open, but a grocery may not? Both

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<sup>122</sup> 179 Neb. at 713-14, 140 N.W.2d at 32 (1966).

<sup>123</sup> 45 NEB. L. REV., *supra* note 39, at 787.

<sup>124</sup> See generally *Skag-Way Dept. Stores, Inc. v. City of Omaha*, 179 Neb. 707, 710-11, 140 N.W.2d 28, 31 (1966); Comment, *A New Look at Sunday Closing Legislation*, 45 NEB. L. REV. 775, 787 (1966). See also Note, *Sunday Laws*, 43 N.C. L. REV. 123 (1964); "... [D]istinctions made to allow one activity on Sunday and disallow another have no logical explanation." *Id.* at 149.

The state statutes have evidenced a wide variety of unexplainable and irreconcilable classifications and exceptions. The only possible explanation seems to lie in the ability of the various pressure groups to have their desires solidified into legislation. Note, *Sunday Blue Laws: An Analysis of their Position in our Society*, 12 RUTGERS L. REV. 505, 511 (1958).

<sup>125</sup> The Courier-Journal, Sept. 17, 1969, § A, at 10, col. 3.

<sup>126</sup> "The antiquity of the Sunday legislation may tend to cause it to be regarded as part of our American way of life, but the length of time which a statute has been in force does not obviate its shortcomings. In fact, it is this antiquity which is responsible for much of the hostility toward these laws. Many statutes are outdated. Many have terminology which renders enforcement impossible." Note, *Sunday Blue Laws: An Analysis of Their Position in our Society*, 12 RUTGERS L. REV. 505, 507 (1958).

<sup>127</sup> *Id.* at 508.

<sup>128</sup> 37 IND. L.J., *supra* note 47, at 415.

<sup>129</sup> Note, *Sunday Laws*, 43 N.C. L. REV. 123, 151 (1964).

<sup>130</sup> The Louisville Times, Jan. 24, 1963.

the druggist and the grocer sell for profit. Not only is the law on its face discriminatory, but also the way the law is enforced.<sup>131</sup>

*Tenth*, the Sunday closing law is a drain on Kentucky's economy. If not permitted to operate on Sunday, many small "Mom-and-Pop" stores will be forced to go out of business.<sup>132</sup> A chain of small grocery stores in Louisville said they would lose more than one million dollars a year in profits if they could not operate on Sunday.<sup>133</sup> But more important is the "dollar exodus" from Kentucky to Southern Indiana. On Sundays, the spacious parking lots of Indiana shopping centers are filled with a large percentage of Kentucky cars.<sup>134</sup> It would therefore appear that the pious merchants of downtown Louisville have proved to be no match for the consumer ingenuity of Kentucky shoppers. The real loser, however, is Kentucky's economy.

This has been a summary of the attacks that have been and are presently being made against Kentucky's Sunday closing law. In many instances, it would seem that any one of a number of these attacks should be enough to enable the Court to declare the statute invalid or to justify the legislature in repealing it. If not, then the totality of the faults and attacks become overwhelming. And yet, the foremost reason why the Sunday closing law should no longer exist has not been mentioned. That reason stems from the realization that the ideals behind the statute have been prostituted into a weapon of economic warfare.<sup>135</sup> This is a use scarcely conceived of by the originators,

<sup>131</sup> "It is impossible to enforce the law *fairly*, for the law itself is *unfair*." (Emphasis added). The Courier-Journal, Sept. 1, 1969, § A, at 10, Col. 2. Louisville's police chief said it would amount to discrimination to prosecute only those merchants against whom a warrant had been taken because it ignored all the other people who were doing the same kind of business. See also The Courier-Journal, Sept. 2, 1969, § A, at 14, col. 3.

<sup>132</sup> The Louisville Times, Jan. 18, 1963.

<sup>133</sup> The Lexington Herald & The Lexington Leader, Oct. 11, 1969, at 13, col. 4-6.

<sup>134</sup> The Courier-Journal, Sept. 8, 1969, § A, at 1, col. 4.

<sup>135</sup> Note, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 12 *RUTGERS L. REV.* 505 (1958).

. . . [B]lue laws often remain unenforced until some private group agitates against certain individual interests which they oppose. This inevitably leads to discriminatory enforcement. As a result of this, the blue law becomes a weapon in an economic struggle, a use scarcely conceived of by the originators of this type of legislation. *Id.* at 508. See also The Courier-Journal, Sept. 20, 1969, § A, at 1, col. 1-2. The recent attempts by the Retail Merchants Association is an attempt by certain business interests to enforce the law only as to their competitors. See also The Courier-Journal, Sept. 17, 1969, § A, at 10, col. 3. Police Judge William C. Colson said the law has been used as a weapon in restraint of trade by a group of downtown merchants against their suburban competitors. See also The Courier-Journal, Sept. 11, 1969, § A, at 8, col. 2-3. For the past six weeks, the Retail Merchants Association has been waging a strictly cash-register war. See generally The Courier-Journal & Times, April 13, 1969, § B, at 7, col. 1-4. In this article mention was made of the trade wars going on.

yet one that is presently condoned by both the Court and the legislature.

The warfare is the result of a growing fight between the roadside merchant discount store and his downtown business section competitor. Traditionally, the downtown stores have remained closed on Sunday and have sought to compel their competitors to do likewise in light of the tremendous volume of business done by the discount stores on Sunday.<sup>136</sup>

It should be noted that our personal liberty

. . . is under constant attrition, in the desire for more sweeping governmental control in private affairs and in the development of pressure groups which are unable to reach their objections through voluntary association and, for reasons not entirely altruistic, demand the powerful aid of the law.<sup>137</sup>

The citadel of downtown merchants would have the public believe to the fact that they want only to protect the people, when the people are neither aware of any harm nor concerned over any need for protection. This altruistic gesture does not blind the au courant individual that the protection afforded "is more related to obvious benefits accorded to the group in its private character than to the merely colorable advantage to the public."<sup>138</sup>

When the primary purpose of an act is to suppress competition, the fact that the act would incidentally serve an end permissible to the state, i.e., providing a day of rest, ought not to save it.<sup>139</sup>

There have been many comments about Sunday closing laws, the majority of which are less than complimentary. It has been said of the Sunday laws in general that they are "nothing short of ridiculous,"<sup>140</sup> "tyrannical,"<sup>141</sup> "an unbelievable hodge-podge,"<sup>142</sup> and have

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<sup>136</sup> Note, *Sunday Blue Laws: A New Battle on an Old Front*, 11 SYRACUSE L. REV. 254, 258 (1960). See also *The Courier-Journal & Times*, Sept. 1, 1969, § A, at 10, col. 1-2.

The law for many years caused no problems because there was no effort to enforce it broadly. The rise of the discount house and other enterprises that rely on Sunday sales for a large portion of their business has, in recent years brought a series of moves for enforcement. These moves have been initiated by merchants who want to stop competitors from doing business on Sunday—no matter how many people want to be able to shop on Sunday. That's what the present fight is all about. *Id.* <sup>137</sup> 43 N.C. L. REV., *supra* note 132, at 136.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 136-37.

<sup>140</sup> *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 591 n.6 (1961).

<sup>141</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (dissenting opinion).

<sup>142</sup> *Crown Kosher Super Markets, Inc. v. Gallagher*, 176 F. Supp. 466, 472 (D. Mass. 1959).

caused a "vexing state of uncertainty and widespread confusion . . . so notorious as to be the subject of judicial notice."<sup>143</sup> The classic statement on the state of the law was made by Judge Furman of Oklahoma:

They should either be amended or repealed. We do not like to speak disrespectfully of any legislative act; but our present laws upon the subject of Sabbath breaking are a miserable farce.<sup>144</sup>

As to Kentucky's stratagem of righteousness, it has been said to be "asinine,"<sup>145</sup> it has been called "an ass,"<sup>146</sup> and it is presently epitomized as "the chicken law."<sup>147</sup> It has no doubt been called a few stronger things by a number of disgusted and frustrated would-be shoppers, who much to their dismay, have found their favorite stores forced to close on Sunday.<sup>148</sup>

If, then, this be the status of and the sentiment toward Kentucky's Sunday closing law,<sup>149</sup> *what* must be done? In such situations, there are always two alternatives, either declare the statute invalid or repeal it. Either alternative could be invoked. However, the controversial nature of the Sunday closing law has made it unpleasant for either the Court or the legislature to take a stand. When individuals, who before hearing committees or during criminal litigation, have found it painful to take a stand, they try diligently to avoid the unpleasantness by "taking the fifth" amendment. And when the Court was on trial as to whether or not to do away with the "tyranical," "asinine," "chicken-law," the Court "took the chicken." In *City of Ashland v. Heck's, Incorporated*,<sup>150</sup> the Court in defending the actions of public officials who had enforced the Sunday closing law said:

. . . [I]t is manifest that they are the innocent victims of a persisting legislative neglect, disinclination or inability (whichever it may be) to come to grips with the problem—indeed, the ob-

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<sup>143</sup> *Harvey v. Priest*, 366 S.W.2d 324, 327 (Mo. 1963).

<sup>144</sup> *Todd Cheeves v. State*, 5 Okla. Crim. Rep. 361, 114 P. 1125 (1911).

<sup>145</sup> *The Louisville Times*, July 28, 1965.

<sup>146</sup> *The Courier-Journal*, Sept. 20, 1969, § A, at 1, col. 1-2.

<sup>147</sup> "It's called the 'chicken law' because neither the legislators nor the courts have enough guts to tackle it." *The Courier-Journal & Times*, Sept. 7, 1969, § A, at 1, col. 1-3.

<sup>148</sup> Consider the following:

Several suburban grocery stores were closed much to the disgust and frustration of a number of would-be shoppers. Some whipped out of parking lots with lips tightly pursed. *The Courier-Journal*, Sept. 8, 1969, § A, at 1, col. 4.

<sup>149</sup> A group of women marched on the Governor's office to demand legislative action on the statute. "We can't live with law as it is, it will have to be changed." *The Courier-Journal*, Oct. 16, 1969, § B, at 19, col. 5-6.

<sup>150</sup> 407 S.W.2d 421 (Ky. 1966).



ligation—of bringing a poor law into conformity with the facts of life. . . . Clearly, this is a legislative matter.<sup>151</sup>

This would leave the fate of the law in the hands of the legislature. And perhaps this is rightfully so. For in this way, the voices of the majority of Kentucky's citizens shall be heard. It is apparent from the degree of discontent and the voluminous litigation in the lower courts that the majority of Kentucky's citizens would welcome the repeal of the Sunday closing law.

No doubt, fear of the consequences of repealing the law has been a barrier to any prior legislative action. The legislators and the judges on the Court fear any positive action

. . . because of the several strong pressure groups favoring the Sunday laws, who might well convince the otherwise lethargic voters that anyone who would vote against it is anti-God and irreverent.<sup>152</sup>

Since even many church leaders are in favor of repealing the law, fear of being said to be anti-God and irreverent should not be an impediment to positive legislative action.

It might be natural to assume that Christians are in favor of Sunday legislation and that non-Christians oppose it; this, however, is by no means true. . . . [S]ome of the staunchest Christian clergymen as well as laymen—who have the greatest interests of Christianity at heart . . . are definitely opposed to Sunday legislation.<sup>153</sup>

There has been no report of any large decline in church attendance in either California or Colorado, both of which have no Sunday closing law.<sup>154</sup> In fact, church statistics show that more people attend church on Sunday in California than in any other state in the Union in proportion to its population.<sup>155</sup> And in Kentucky, ministers of all denominations have criticized the Sunday closing law as being an attempt by the church to enforce religion through law.<sup>156</sup>

Many people have also feared that if the Sunday closing law is repealed, a seven day work week will develop. Suffice it to say, the states that have either repealed their Sunday laws or have judicially declared them to be invalid, have not found this problem to exist.

The advantage of repealing the law out-weigh by far any possible

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<sup>151</sup> *Id.* at 424-25.

<sup>152</sup> 12 RUTGERS L. REV., *supra* note 114, at 519.

<sup>153</sup> Johnson, *supra* note 4, at 160.

<sup>154</sup> 12 RUTGERS L. REV., *supra* note 114, at 514.

<sup>155</sup> Johnson, *supra* note 4, at 160.

<sup>156</sup> *Cf.* The Louisville Times, Jan. 19, 1962.

disadvantages or fears, such as those above mentioned. First of all, the discontent and resentment of the populace would be quieted. Secondly, law enforcement agencies wouldn't have to spend so much of their time on Sunday trying to enforce a law that no one knows how to enforce. Thirdly, the court system would not be bogged down with Sunday closing law litigation. And fourthly, this would bring Kentucky's statutes more in tune with the times. As the population continues to shift from cities with their downtown department stores to suburban and rural areas served by shopping centers, the conviction grows that compulsory closing laws are incongruous with the temper and tempo of American life.<sup>157</sup> "New occasions [sic] teach new duties; time makes ancient good uncouth; they must upward still, and onward, who would keep abreast of truth."<sup>158</sup>

If an excursion through history can be used to correct the mistakes of the past, then this journey should prove fruitful. The theocratic Puritan legislators made their mistake in never thinking to question the wisdom of their laws. Their laws created disrespect just as Kentucky's present law does. The Puritan legislators failed to act; Kentucky's must.

*John William Bland, Jr.*

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<sup>157</sup> The Courier-Journal, April 22, 1962.

<sup>158</sup> State v. Grabinski, 3 Wash. 2d 603, 605, 206 P.2d 1022, 1023 (1949).